86-214

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES R. KESTER, ROLAND D. LIBBY, HAZEL E. SUTHERLAND, WILLIAM B. SUTHERLAND, TEIKICHI HIGA, GRACE HARNESS and SARAH ARQUIRERO, on behalf of themselves and all others similarly situated

Petitioners,

v

CONSTANCE HORNER, Director, OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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H2PP

QUESTIONS PRESENTED

1. Whether the decision of the Circuit Court of Appeals for the Federal Circuit below conflicts with decisions of other circuits and provides for lack of uniformity.

2. Whether the President when given statutory authority to implement the substantive provisions of that statute by regulation, may, by way of such regulations, abrogate, circumscribe or nullify the substantive benefits provided by that statute to the detriment of some or all of those entitled to such statutory benefits.

3. Whether Executive Order 10,000, which requires deductions in the cost of living allowance (COLA) of federal employees who are furnished commissary, lodging, or other purchasing provileges, intended the words "are furnished" to mean "are furnished as a direct consequence of present federal civil service employment."

4. Whether the Cost of Living Allowance provided to federal civil service employees in non-foreign areas under 5 U.S.C. §5941 may be reduced or eliminated by the Civil Service Commission by virtue of such employees' access to commissary and exchange privileges resulting from prior or current service in or connections with the United States Armed Forces.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES R. KESTER, ROLAND D. LIBBY, HAZEL E. SUTHERLAND, WILLIAM B. SUTHERLAND, TEIKICHI HIGA, GRACE HARNESS and SARAH ARQUIRERO, on behalf of themselves and all others similarly situated

Petitioners,

v.

CONSTANCE HORNER, Director, OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in the above—entitled case on April 18, 1986.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Federal Circuit affirming the decision of the District Court is reported at *Kester v. Horner,* 778 F.2d 1565 (Fed. Cir. 1985) and is set forth in the Appendix. The Final Order and Judgment of the District Court denying Plaintiffs' Motion for Reconsideration and granting Defendant's Motion to Dismiss can also be found in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on November 21, 1985. The Suggestion of Rehearing In Banc was declined by Order dated February 24, 1986. The Petition For Rehearing By The Panel was denied by Order dated April 8, 1986. The final judgment of the United States Court of Appeals for the Federal Circuit was then entered on April 18, 1986.

The jurisdiction to the Supreme Court is invoked under Rule 28 U.S.C. §1254.

EXECUTIVE ORDER INVOLVED

This case involves Section 205(b) of Executive Order 10,000. The section states:

(b) The Civil Service Commission shall . . .

(2) in fixing the Territorial cost-of-living allowance pursuant to such subsection, make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost.

STATEMENT OF THE CASE [1]

This case involves the interpretation and application of Executive Order 10,000 issued in 1948 by President Harry Truman which established the cost-of-living allowance (COLA) system.[2]

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[1] The statement of the case is taken substantially from the opinions below.

[2] Section 104 of the Supplemental Independent Office Appropriations Act of 1949 P.L. 80-862, recodified as 5 U.S.C. §5941. This section states in pertinent part:

(a) Appropriations or funds available to an Executive agency for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on –

(1) living costs substantially higher than in the District of Columbia;

* * *

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

This system provides that employees of the Federal Government who are situated in areas apart from the continental United States are having living costs substantially higher than in the District of Columbia, are entitled to COLA in addition to their base pay.[3]

Executive Order 10,000 further provided that:

(b) The Civil Service Commission shall . . .

(2) in fixing the Territorial cost-of-living allowance . . . make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost. Exec. Order No. 10,000 §205(b) (2), 3 C.F.R. 795 (1943-1948 Compilation) (1957) (emphasis added).

In 1976, the phrase "are furnished" was interpreted by the Civil Service Commission (now known as the Officer of Personnel Management) to mean furnished by any source in the Federal government. 5 C.F.R. §591.201, et seq. (1976).

Plaintiffs then filed a class action in the United States District Court of the District of Hawaii, challenging said Civil Service Commission's interpretation and seeking the restoration of COLA benefits withheld because of the interpretation.[4] The class is made up of

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[3] *Id.*

[4] Plaintiffs' COLA benefits were temporarily restored by Executive Order 12, 070, effective July 30, 1978. The present issue therefore pertains to COLA benefits withheld from December 5, 1976 to July 30, 1978. *Kester v. Campbell*, 652 F.2d 13, n.2 (9th Cir. 1981). app., infra, pp. 2a—3a. Though under the Commission's and the President's interpretation, the Executive Order could be withdrawn at any time, resulting in loss for future benefits.

Federal Civil Service employees on the islands of Kauai and Oahu, State of Hawaii, who are entitled to receive commissary and exchange privileges as a consequence independent of their present employment with the Federal Civil Service and whose COLA was reduced or eliminated because of the above-mentioned Civil Service interpretive regulations. This class included retirees from military service, dependents of retired military servicemen, dependents of active duty military servicemen and widows, widowers or dependents of deceased military servicemen. Defendants are members of the Civil Service Commission. Jurisdiction was based upon the Federal Tort Claim Act[5], the Administrative Procedure Act[6], and upon the federal question jurisdiction statute.[7]

Cross-motions for summary judgment were filed by Defendants also filing in the alternative, a motion to dismiss. The District Court granted summary judgment to Plaintiffs on Count 1 of their Third Amended Complaint.[8] The Court opined that the phrase "are

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[5] 28 U.S.C. §1845(b) (1976)

[6] 5 U.S.C. §702 (1976)

[7] 28 U.S.C. §1331(a) (1976)

The Ninth Circuit Court of Appeals, however, based jurisdiction under the Tucker Act, 28 U.S.C. §1346(a) (2), 1491 (supp. II, 1978). See, *Kester*, 652 F.2d 13 (9th Cir., 1981),

[8] Although Plaintiffs alleged eight different and separate counts in their Third Amended Complaint, just three were the basis for the cross-motions for summary judgment. The District Court decided the issue based only on Count I. See *Kester v. Campbell*, 467 F.Supp. 913 (D. Haw., 1979).

furnished" could only reasonably be interpreted to mean "are furnished as a consequence of the person's present civil service employment."[9] The Civil Service Commission's interpretation was held to be unreasonable in view of the absurd results it would cause. Defendants then appealed the District Court's order to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court of Appeals reversed the District Court and remanded the case with directions to dismiss Count 1. It held that the interpretation by the Civil Service Commission was reasonable in light of the Order's ambiguous language.[10]

Plaintiffs petitioned this Court for a writ of certiorari during the October Term of 1981 as to the decision of the Ninth Circuit as to Count I. Said petition was not granted. Plaintiff then proceeded to litigate the remaining counts of the case back in the District Court for the District of Hawaii where Count I had been summarily adjudged in favor of Plaintiffs before the Ninth Circuit Court of Appeals reversed same.

Plaintiffs moved for summary judgment as to Counts II, III, IV and VII of the Third Amended Complaint while, currently, Defandant

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[9] *Kester,* 467 F.Supp. at 914.

[10] 652 F.2d 13

cross-moved for summary judgment on Counts IV and VII and for a dismissal of Counts II, III and V. Counts VI and VIII were voluntarily withdrawn by Plaintiffs.

The District Court for the District of Hawaii granted summary judgment in favor of Defendant and against Plaintiffs on Counts IV and VII. Counts II, III and V were dismissed upon Defendant's motion. Hence, all claims were then disposed of by the District Court. Plaintiffs moved for reconsideration of the Court's entry of summary judgment against them with respect to Count VII which was denied.

On January 31, 1984, Plaintiffs filed their Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit regarding the District Court's order denying Plaintiffs' Motion for Summary Judgment as to Counts II, III, V and VII and the Order denying Plaintiffs' Motion for Reconsideration as to Count VII.

The appeal before the Ninth Circuit was transferred to the United States Court of Appeals for the Federal Circuit which had the appropriate and proper jurisdiction to hear the appeal.

The United States Court of Appeals for the Federal Circuit affirmed the District Court's rulings on appeal by a 2-1 margin with Senior Circuit Judge Miller dissenting in part.[11]

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[11] A copy of the Opinion is appended hereto and is reported at *Kester v. Horner*, 778 F.2d 1565 (Fed. Cir. 1985)

Judgment was entered on November 21, 1985.[12]

Plaintiffs filed a Suggestion of Rehearing In Banc and a Petition for Rehearing by the Panel. They were denied on February 24, 1986 and April 8, 1986, respectively.[13] Final judgment was then entered by the United States Court of Appeals for the Federal Circuit on April 18, 1986.[14]

REASONS FOR GRANTING THE WRIT

THE CASE AT HAND INVOLVES SIGNIFICANT FEDERAL STATUTORY ISSUES AND THE RULING OF THE FEDERAL CIRCUIT IS IN DIRECT CONFLICT WITH MAJOR DECISIONS OF THE FIFTH AND NINTH CIRCUITS THEREBY LACKING UNIFORMITY

In the instant case, the Federal Circuit has rendered a decision significantly expanding the power of the executive branch. The effect of the ruling is that the executive branch may now expand the boundaries by which it determines payment of certain allowances to Federal employees, beyond a statutorily limited mandate set by Congress. The decision in question is in direct conflict with the decision of the Fifth Circuit Court of Appeals in *Day v. United States*, 611 F.2d 1122 (5th Cir. 1980) and the Ninth Circuit in *Levy v. Urbach*, 651 F.2d 1278 (1981).

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[12] See Appendix.

[13] *Id.*

[14] *Id.*

The Federal statute in question, Section 5941 of Title 5 of the United States Code, provides in pertinent part as follows:

> *Allowances Based On Living Costs And Conditions Of Environment; Employees Stationed Outside Continental United States Or In Alaska*
>
> (a) Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on —
>
> 1. living costs substantially higher than in the District of Columbia;
> 2. conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or
> 3. both of these factors.
>
> The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

Despite the explicit language of this statute, the Court, in the instant case, has ruled that the executive may institute allowance payment rate reductions for certain employees solely by reason of their receipt of commissary and exchange privileges unrelated to their Federal employment. By so doing, defendant deliberately understates (to the detriment of the Hawaii Federal employee) the differential

between living costs in Hawaii as opposed to Washington, D.C. The non-compliance with the statute arises by virtue of the failure to take into account the effect of such privileges on similarly situated employees in Washington, D.C. (i.e. those in Washington, D.C. receiving military commissary and exchange privileges for reasons unrelated to their Federal employment). As noted in Judge Miller's dissent in the Federal Circuit decision:

> The record shows that, in setting the COLA for appellants, "living costs" substantially higher than those in the District of Columbia were reduced to reflect commissary and exchange privileges of employees in Hawaii — without taking into account such privileges of otherwise similarly situated employees in the District of Columbia. Thus, any differential between "living costs" in Hawaii and those in the District of Columbia *would have been understated.* OPM's interpretation of "living costs" in the District of Columbia under 5 U.S.C. §5941 is arbitrary, and no rational basis for the flawed differential appears.

The complained of regulation overturned a policy of some 26 years standing. Prior to 1976, from 1948 when the regulations implementing COLA were implemented, Section 205(b) 2 of E.O. 10,000 and 5 U.S.C. §5941 were *not* interpreted to allow deduction for unrelated commissary and exchange privileges.

Moreover, the majority opinion of the Federal Circuit in the instant case is in direct conflict with *Day v. United States,* 611 F.2d, 1122

(5th Cir., 1980), *cert denied* 449 U.S. 919 (1980) and *Levy v. Urbach*, 651 F.2d 1278 (9th Cir., 1981). The statutory scheme and attempted Presidential regulations which were at issue in *Day* are identical in manner of application and impact to those in the instant case. In *Day*, the statutory section providing for BAQ (military officer housing allowances) gave the President the authority to prescribe regulations for its administration. Pursuant to that grant, the President issued an executive order which simply said that any quarters occupied rent free at an officer's permanent duty station "shall be deemed ... appropriate and adequate". The government therefore argued that such quarters were *ipso facto* adequate, the actual circumstances (of alleged substandard quarters) notwithstanding. The Court noted as follows in response to this position:

> The *district court properly grounded this sophistry.* The general rule enacted by Congress is that all officers are entitled to BAQ; there is an exception to the legislative mandate when adequate and appropriate quarters are provided. *The power to make regulations defining what is adequate and appropriate is not a delegation of authority to wipe out the statute by imposing an Orwellian definition that adopts no standard at all. Regulations must be consistent with the statutory authority that alone gives them validity.*
> (citations omitted)
>
> *They may lack rhyme, and, unfortunately, sometimes are turgid, but they must be based on some kind of reason.*

Day v. United States, supra, at 1124 (footnote omitted). (emphasis added)

In contrast to this holding, the Federal Circuit in the instant case held as follows;

> 5 U.S.C. §5941 does not provide Appellants or any other federal employees with a COLA entitlement. On the contrary, any such entitlement to COLA stems solely from the regulations the President prescribes in implementing his statutory authority. We reiterate that this authority is broadly delegated, and we see nothing in the language of 5 U.S.C. §5941 to preclude the President, in setting COLA rates, from considering the reduced need of federal employees who have access to lower priced goods and services at military commissaries and post exchanges. 5 U.S.C. §5941 squarely bases COLA upon "living costs substantially higher than in the District of Columbia" and is meant to compensate employees who face living costs substantially higher than those found in that reference area. Since commissary and exchange privileges affect the living cost of those who enjoy them, it is not unreasonable to consider such benefit in establishing an appropriate COLA.

The Court's holding that 1) the entitlement availability is at the executive branch's pleasure and 2) that it may therefore issue broad regulations which have the impact of nullifying the effect of the statute for certain groups and individuals (the plaintiff class) contrasts sharply with *Day* and *Levy.* Both *Day* and *Levy* stand for the proposition that the authority given to the President by Congress to implement statutory allowances by way of regulation is nevertheless not license to circumscribe, abridge or nullify the explicit purpose of the

statute. As recited in *Levy v. Urbach, supra:*

> While rule-making authority may be delegated the primary legislative function may not:
>
> > On the other hand, courts have long admonished the executive that a delegation of rule-making authority is not a delegation of the primary legislative function. As the Supreme Court held several decades ago:
> >
> > > "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law-for no such power can be delegated by Congress-but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity . . . And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."
> > > (citations omitted)
> >
> > *Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936). See also, e.g., *United States v. Larionoff,* 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *Dixon v. United States,* 381 U.S. 68, 85 S.Ct. 1301, 14 L.Ed.2d 223 (1965); *Ellis v. United States,* 610 F.2d 760 (Ct.Cl. 1979).
>
> *The Supreme Court has looked with particular disfavor upon regulations which in some sense add to or alter statutorily-defined criteria for eligibility for a particular benefit.* (emphasis added)

Levy v. Urbach, supra, at 1282-1283.

Finally, the Court noted that the standard of "plainly and palpably inconsistent" would now allow the order to be interpreted in a way that would deny the Plaintiffs benefits to which they were entitled by law.

> While we must accord deference to the President's interpretation of the Career Compensation Act and overturn the Executive Order only if it is plainly inconsistent with the statute, we also cannot blind ourselves to any change which the Order might work in the operation of the statute so as to deny the plaintiffs any benefit to which they might otherwise be entitled.

Levy v. Urbach, 651 F.2d, 1278 and 1283.

In direct contrast to *Levy* and *Day,* the Federal Circuit in the instant case has held that where the Congress has authorized a specific allowance payment program and authorized the President to implement that program, Congress has thereby given "broad authority" amounting to virtually unfettered discretion to discriminate among potential recipients of that allowance, basing such discrimination on whatever category of "need" that he may choose:

> We reject Appellants' assertion that the statutory term "classes of employees" in 5 U.S.C. §5941 requires that only job related criteria may be employed in setting

> COLA rates. We find scant support in the legislative history to suggest this interpretation and do not attach the meaning Appellants apply to the words "classes of employees" to preclude the President from using factors other than job related criteria, such as need, to set COLA rates.

The court seeks to further support this argument by noting a 25% upper limit for the payment of such allowances and thus rationalizes that this upper limit eliminates the need for economic equivalency between the plaintiff class and other Federal employees affected by 5 U.S.C. §5941. Yet, that holding as well as the holding of broad Presidential authority under the statute conflicts directly with the statutory language of 5 U.S.C. §5941 and also stands in direct contrast to its own previous decision on 5 U.S.C. §5941 in *Alaniz v. Officer of Personnel Management*, 782 F.2d 460, where it was noted:

> (1) the law governing the COLA program is phrased in mandatory, rather than permissive language. See *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 60 L.Ed.2d 1017 (1979); and
> (2) there is law to apply, as the COLA statute, Executive Order and regulations all contain legal standards for reviewing OPM's actions. 545 F.Supp. at 1185.

Alaniz, supra, at 1463 (summarizing District Court's opinion below).

In striking contrast to *Day, Levy* and *Alaniz*, the Federal Circuit in this decision has ruled that where the President is given discretion to implement a program by regulation, the standards of

consistency and reason which are set forth in those decisions are not applicable. In so doing, the court has not only misconstrued the meaning and function of the statute involved, but has also misconstrued and created a direct conflict with the decisions in *Day, supra* and *Levy, supra,* as well as its own decision in *Alaniz, supra.*

The Court has misconstrued the applicable statute in that the powers granted to the President (and CSC/OPM by delegation of authority) by 5 U.S.C. §5941 are well defined and narrow. The operative language which determines the scope of the President's power in the implementing legislation is the last sentence of subsection (a) of 5 U.S.C. §5941:

> "Except as otherwise specifically authorized by statute, the allowance is paid *only* in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and *classes of employees* to which each rates applies." (emphasis added)

The parameters of the President's regulatory authority in this subject matter are therefore as follows:

1. He may estalbish the COLA rates;
2. He may define the area(s) to which those rates apply;
3. He may define the groups of positions to which those rates apply;

4. He may define classes of employees to which each rate applies.

The first three of the foregoing regulatory functions are not relevant to the present action. It is undisputed that the President can and does establish the COLA rates for the geographical areas in question (functions 1 and 2 above). The question of classification by groups of positions (function 3 above) has also never been an issue in this case (Plaintiffs' positions as class members run practically the whole gamut of G.S. ratings present in Hawaii today).

Thus, the actions of Defendant, if they are to be sustained, must fall exclusively within the fourth regulatory function and power granted the President: the right to define classes of employees to which each rate applies. If the President has the authority to deprive Plaintiffs of their COLA by reason of their receipt of commissary and exchange privileges which are not related to their Civil Service employment, it is from this last function and grant of power that he must derive his authority.

Hence, the discrepancies in decisions of the Circuit Courts of Appeals have resulted in conflicts in applications of statutory authority which has the direct effect of providing for non-uniformity in the various jurisdictions. The conflict should be resolved to establish uniformity.

THE INSTANT CASE IS OF GREAT IMPORTANCE IN THAT IT IMMEDIATELY AFFECTS SOME 2,000 PLAINTIFFS OWED MANY MILLIONS OF DOLLARS IN HAWAII ALONE AND IN THAT THE TEMPORARY EXECUTIVE ORDER TEMPORARILY RESTORING PLAINTIFFS' COLA PROSPECTIVELY, MAY BE ITSELF RESCINDED AT ANY TIME, THEREBY AFFECTING PRESENT COLA RECIPIENTS

Plaintiffs are a class of some 2,000 in Hawaii alone and were deprived of, by agreed estimate between the parties, some six million dollars ($6,000,000.00) in pay by virtue of the ruling. Executive Order 12,070 restored, but by its own terms temporarily, the affected allowances *prospectively.* Given the Court's ruling in this matter, there is nothing to prevent the present recision of that ruling, the effect of which would be to deprive not only the thousands of affected recipients in Hawaii of COLA, but also those in Alaska and all other areas where COLA may be paid. It is, therefore, a live and continuing issue of importance not only to the present plaintiff class but anyone with military affiliation, past or present who may be in or contemplating entering federal service, and is a significant potential impediment to their continuing service.

The decision of the Federal Circuit permits the executive and its agencies without statutory authority, to promote economic differentials among similarly situated civil service employees on the basis

of their military or military dependent backgrounds. It effectively provides for a foundation whereby without congressional authority, ex-military personnel and their depoendents can be penalized for having served with the armed forces or having been a dependent thereof. The benefits of this class of individuals should not be used as a basis for denying them present COLA benefits as non-ex-military/dependents are provided.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Attorney for Petitioners

(Appendix follows)

APPENDIX

President Carter's suspension of COLA reductions is published at 43 C.F.R. 28977 (June 3, 1978) and provides as follows:

THE PRESIDENT

[3195-01]

Executive Order 12070 June 20, 1973

Adjustment of Cost of Living Allowances

By the authority vested in me as President of the United States of America by Section 5941 of Title 5 of the United States Code, and in order to authorize the temporary restoration of the cost of living allowance to certain employees, it is hereby ordered as follows:

1-1. *Suspension of Applicable Requirements.*

1-101. The requirement of Section 205(b)(2) of Executive Order No. 100000, as amended, that consideration be given to quarters or subsistence, commissary or other purchasing privileges, in determining cost of living allowance rates, is suspended except to the extent that such privileges are furnished as a result of Federal civilian employment.

1-102. Quarters or subsistence, commissary or other purchasing privileges, shall nor be maken into consideration in determining cost of living allowance rates of employees who are furnished such facilities as a result of Federal civilian employment but who do not use them.

1-2. *Administrative Matters*

1-201. This Order shall take effect July 30, 1973 and shall operate prospectively.

1-202. The United States Civil Service Commission shall conduct a study of problems associated with the implementation of Section 5941 of Title 5 of the United States Code. The Commission's findings and recommendations for long-term solutions to problems encountered with respect to the cost of living allowance and differential compensation authorized by that statute shall be submitted to the President.

/S/ Jimmy Carter

THE WHITE HOUSE
June 30, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHARLES R. KESTER, et al.,

Plaintiffs,

v.

DONALD J. DEVINE,

Defendant.

Civil Action No. 76-0423

FINAL ORDER

On August 10, 1982, this Court granted summary judgment against the plaintiffs and in favor of the defendant on Counts IV and VII of the Complaint.[1] On or about April 6, 1983, the defendant moved to dismiss the second, third and fifth counts of the compalint. In response, plaintiffs moved for reconsideration of the Court's ruling on count VII, and cross-moved for summary judgment on the second and third counts of the complaint. Plaintiffs also conceded that count V had been effectively disposed of by the ruling in *Curlott* v. *Hampton*, 598 F. 2d 1175 (9th Cir. 1979).

The relevant issues have been extensively briefed by the parties, and on November 21, 1983, the Court heard oral argument. The parties concede and the Court so finds that there are no material issues of fact which would preclude entry of a judgment at this time on the pleadings. After careful consideration of the positions of the parties, the authorities cited in support thereof and review of the record contained herein, the Court is persuaded by the position of the defendant which is consistent with the decision rendered in *Kester* v. *Campbell*, 652 F.2d 13 (9th Cir. 1981).

Accordingly, on this 19th day of January, 1983 it is hereby ORDERED that plaintiff's motion for reconsideration is denied and that defendant's motion to dismiss the remaining claims of this action be and hereby is granted.

/S/ Samuel P. King
Samuel P. King
United States District Judge

APPROVED AS TO FORM:

/S/David M. Robinson

DAVID M. ROBINSON
Attorney for Plaintiffs

KESTER, et al. v. DEVINE
Civil No. 76-0423
Final Order

[1]Count 1 was disposed of in *Kester* v. *Campbell*, 467 F. Supp. 913 (D. Hawaii), *rev'd*, 652 F. 2d 13 (9th Cir. 1981). Counts VI and VIII were voluntarily withdrawn by the plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHARLES R. KESTER, et al.,

Plaintiffs,

v.

DONALD J. DEVINE,

Defendant.

Civil Action No. 76-0423

JUDGMENT

In accordance with the Final Order entered on January 23, 1984, judgment is hereby entered dismissing this action with prejudice.

_____

Clerk, United States District Court
District of Hawaii

DATED: January 23, 1983

United States Court of Appeals for the Federal Circuit

CHARLES R. KESTER, ET. AL.,

Appellants

v.

CONSTANCE HORNER, Director,
Office of Personnel Management *,

Appeal No. 85-884

Appellee.

DECIDED: November 21, 1985

Before BALDWIN, KASHIWA, *Circuit Judges* and MILLER, ** *Senior Circuit Judge.*

Appellants, Charles D. Kester, et al., appeal from the final judgment of the United States District Court for the District of Hawaii, Judge Samuel P. King presiding, reported at 545 F. Supp. 356, dismissing Counts II, III, IV and VII of Appellant's Third Amended Complaint. We affirm.

I. BACKGROUND

In 1948, President Truman issued Executive Order 10,000 (E.O. 10,000 or Order), establishing the cost of living allowance (COLA) system for federal employees. Under this system, federal employees living outside the continental United States in locales having a substantially higher cost-of-living index than the District of Columbia, are entitled to a cost of living allowance in addition to their base pay. The Order directed that the Civil Service Commission (CSC)[1] periodically, but at least annually, determine the comparative cost of living in the District of Columbia with designated COLA areas and establish appropriate COLA rates commensurate with higher living

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[1]The Commission has been succeeded, for relevant purposes, by the Office of Personnel Management (OPM). *See* Civil Service Reform Act of 1978, Pub. L. NO. 95-454, 92 Stat. 1111 (1978).

* Constance Horner has succeeded Donald J. Devine as Director of OPM.

** Judge Miller assumed senior status effective June 6, 1985, but was on active status when this case was submitted.

costs in those areas. E.O. No. 10,000, §§ 205, 210, 3 C.F.R. §§ 795, 796 (1943-1948 Compilation). The Order further provided that the Commission:

> [I]n fixing the Territorial cost-of-living allowance. . . make appropriate deductions when quarters of subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost.

Id. § 205(b)(2).

In 1976, the Commission issued new regulations, effective as of December 5, 1976, which interpreted the words "are furnished" within the meaning of § *205(b)(2) to mean furnished by any source in the federal government. 41 Red. Reg. 51,579 et seq.* (1976). As a consequence, COLA rates applicable to federal employees in Hawaii who were receiving living quarters, commissary privileges, or other such lower cost benefits were decreased.[2]

Appellants filed this class action seeking restoration of all COLA benefits withheld as a consequence of the aforementioned regulations. The class is composed of federal government employees on the islands of Oahu and Kauai, who are entitled to commissary and exchange (C&E) privileges for reasons independent of their present federal employment but whose COLA was reduced or eliminated as a result of the passage of the 1976 regulations.

In 1979, the district court, Samuel P. King, Chief Judge, granted summary judgment for Appellants on Count I of their Complaint holding that the Commission's 1976 regulations provided an unreasonable interpretation of the "are furnished" phrase because (1) of the language of E.O. 10,000 did not compel this construction, and (2) the new interpretation was inconsistent with that historically given the Executive Order. *Kester* v. *Campbell*, 467 F. Supp. 913, 915 (D. Hawaii 1979). The United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that the regulation providing for reduction of cost-of-living allowance to federal employees who en-

[2]On June 30, 1978 President Carter issued Exeuctive Order No. 12,070, 43 Fed. Reg. 28,977 (1978), effective July 30, 1978, which suspended the requirement of Section 205(b)(2) of E.O. 10,000 except to the extent that quarters, subsistence, commissary and other purchasing privileges are furnished as a function of federal civilian employment. Consequently, Appellants seek restoration of COLA benefits withheld from December 5, 1970 to July 30, 1978.

joyed commissry or exchange privileges for reasons independent of their present federal employment was reasonable and not inconsistent with the language of the executive order creating the cost-of-living allowance. *Kester* v. *Campbell*, 652 F.2d 13, 16 (9th Cir. 1981). On remand from the Ninth Circuit, Appellants argued other theories of recovery contained in their Complaint, unresolved by the district court judge's grant of summary judgment. Appellants argued that the Executive Order violated 5 U.S.C. § 5941, the enabling legislation for COLA, because section 205(b)(2) of the Order failed to guarantee them economic parity with their Washington counterparts who also have access to special purchasing privileges. Appellants further claimed that providing a reduced COLA to federal employees as a result of their receipt of special purchasing privileges, unrelated to their federal civilian employment, was so irrational as to violate the equal protection guarantee of the Fifth Amendment. The district court rejected both contentions. As to the statutory interpretation claim, the Court found that "COLA is meant to compensate employees who face living costs substantially higher than in the District of Columbia. The enabling statute gives the President broad discretionary powers in determining COLA rates and allowances. However, it does not mandate equality in effective compensation." *Kester* v. *Devine*, 545 F. Supp 356, 358 (D. Hawaii 1982). In regard to the equal protection claim, the court held that, because "COLA rates are based upon differences in living costs faced by federal employees" and "plaintiffs [who have C&E privileges] face lower living costs than other federal employees in the same area," the classification rested upon a rational basis that was sufficient to pass constitutional scrutiny. *Id.*

Subsequently, the defendants moved to dismiss Counts II (Interference with Contract), III (Violation of Separation of Powers Doctrine), and V (Violation of Procedural Due Process) of the Compalint. Appellants responsed by seeking reconsideration of the Court's prior ruling on Count VII (Vilation of the Enabling Legislation) and summary judgment as to Counts II and III on the ground that the statutory term "classes of employees" precludes any distinctions in COLA rate predicated upon need, and instead, mandates that only job related criteria be employed in setting COLA rates.

Following briefing and argument on the pending motions, the district court dismissed the remaining counts of the Complaint. Final judgment for the defendants was entered on January 24, 1984, and it is from that judgment that this appeal is taken. Appellants

challenge the district court's judgment with respect to Count II, Count III, Count IV (Violation of Equal Protection) and Count VII. The jursidiction of the district court was based on the Tucker Act, 28 U.S.C. §§ 1346(a)(2)(1982). Jursidiction in this court is conferred by 28 U.S.C. § 1295(a)(2)(1982).

II. DISCUSSION

On appeal, Appellants argue that there is no grant of authority, express or implied, in U.S.C. § 5941 which gives the Executive Branch or any of its agencies, the authority to deprive them of their COLA by creating a class of employees based upon receipt of commissary and exchange privileges for reasons independent of and unrelated to their federal employment. Appellants contend that the government's action in eliminating their COLA violates 5 U.S.C. § 5941 in that it eliminated congressionally mandated parity between themselves and their Washington, D.C. counterparts. Appellants also argue that the actions of CSC/OPM are a violation of the Separation of Powers Doctrine, in that there has been no proper, effective delegation of power from Congress to the Executive Branch, to undertake the actions in question and that the actions of CSC/OPM constitute an unauthorized and unwarranted interference in Appellant's contractual rights and obligations with the Military Forces of the United States.

Appellants further argue that by creating two different classes of employees in Hawaii, and denying COLA to one of those classes, solely because of their receipt of commissary and exchange privileges by virtue of their separate military involvement, CSC/OPM has violated Appellants' rights to Equal Protection under the law as guaranteed by the Fifth Amendment to the Constitution.

In regard to the first of Appellants' contentions, we state at the outset, that our inquiry into the validity of an administrative interpretation of a statute is limited to whether the interpretation at issue is reasonably related to the purpose of the enabling legislation. *Mourning* v. *Family Publication Service, Inc.*, 411 U.S. 356, 359 (1973). To sustain an agency's construction of its authority, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In other words, we give deference to the interpretation given a statute by the officers or agency charged with its administration. *Lovshin* v. *Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) (en banc). Against this

backdrop, we review the regulations the President prescribed in implementing the statutory authority contained in 5 U.S.C. § 5941.

We observe first that 5 U.S.C. § 5941 broadly delegates to the President the power to institute a COLA program and to set forth terms and conditions for payment. In distinct contrast to the statutes at issue in *Levy* v. *Urbach*, 651 F.2d 1278 (9th Cir. 1981), and *Day* v. *United States*, 611 F.2d 1122 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980), cited by Kester, which clearly provided entitlements to certain federal workers, 5 U.S.C. § 5941 does not provide Appellants or any other federal employees with a COLA entitlement. On the contrary, any such entitlement to COLA stems solely from the regulations the President prescribes in implementing his statutory authority. We reiterate that this authority is broadly delegated, and we see nothing in the language of 5 U.S.C. § 5941 to preclude the President, in setting COLA rates, from considering the reduced need of federal employees who have access to lower priced goods and services at military commissaries and post exchanges. 5 U.S.C. § 5941 squarely bases COLA upon "living costs substantially higher than in the District of Columbia" and is meant to compensate employees who face living costs substantially higher than those found in that reference area. Since commissary and exhange privileges affect the living cost of those who enjoy them, it is not unreasonable to consider such benefit in establishing an appropriate COLA. We conclude that section 205(b)(2) of E.O. 10,000, is fully consistent with 5 U.S.C. § 5941 since it ensures that those federal employees with lower living costs due to their special purchasing privileges receive a reduced COLA. We reject Appellants' assertion that the statutory term "classes of employees" in 5 U.S.C. § 5941 requires that only job related criteria may be employed in setting COLA rates. We find scant support in the legislative history to suggest this interpretation and do not attach the meaning Appellants apply to the words "classes of employees" to preclude the President from using factors other than job related criteria, such as need, to set COLA rates.

Appellants further argue that section 205(b)(2) is invalid because that section does not guarantee exact economic equality in purchasing power with their Washington, D.C. counterparts who have access to purchasing privileges at military commissaries and post exchanges. The statutory language of 5 U.S.C. § 5941, however, does not support Appellants' claim for such economic equality. In particular, the language of that section gives no indication that Congress intended to exclusively mandate equality in effective compensation.

Indeed, Congress specifically barred the payment of COLA in excess of 25% of an employees basic pay even if the cost of living differential exceeded 25%. *See* 5 U.S.C. § 5941(a). Since the plain language of 5 U.S.C. § 5941 does not support Appellants' allegation that "economic equality" is guaranteed by the statute we must conclude that a mere difference in the level of COLA assigned to various classes of federal employees does not negate the statute's purpose.

We proceed next to Appellants' constitutional claims. Appellants contend that reductions mandated by section 205(b)(2) violate the doctrine of Separation of Powers. On this issue, Appellants argue that by failing to provide a full COLA to employees with access to military commissaries and post exchanges, the President diluted their right of access to military commissaries and post exchanges.

We do not agree with this contention. First, Congress clearly delegated to the President, under 5 U.S.C. § 5941, the authority to prescribe COLA. Pursuant to this congressional grant of authority, the President provided for differing COLA rates depending on differing need. It is difficult for us to see how the President, in setting COLA rates, has in any way affected the military purchasing privilages which Congress provides to Appellants. Nothing in the COLA provisions in any way revoked or interfered with their access to military commissaries and post exchanges and Appellants' military privileges were and are exactly what they would have been had there been no COLA provisions at all. We must conclude then, that there has been no violation of the separation of powers. We note that *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), upon which Appellants rely, is readily distinguishable from this case. In *Youngstown*, the Court held that President Truman's action to seize steel mills during the Korean War violated the Separation of Powers Doctrine, largely because Congress had declined to enact legislation for the President's actions. In the present case, Congress clearly provided the President the requisite authority to institute a COLA program and the authority to prescribe conditions governing payment of a COLA. 5 U.S.C. § 5941. Moreover, Appellants have not persuasively demonstrated that any possible incentive to enlist, created by commissary and exchange privileges, was diminished by the COLA program.

Appellants also argue that they have been inequitably treated in comparison with other federal employees in Hawaii who receive a full COLA and federal employees in the District of Columbia who have access to military commissaries and post exchanges. Appellants conclude that there is a violation of equal protection because the dis-

tinction in treatment is not rationally related to a valid objective of the statute as implemented by E.O. 10,000.

It is well settled that where a statute does not burden fundamental rights or create classifications predicated on "suspect" criteria, it will not be invalidated on equal protection grounds unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the legislature's actions were irrational. *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979). We believe that the district court correctly upheld the classifications created by the COLA regulations on the basis that they were rationally related to a legitimate government interest. In this case, the government had a legitimiate interest in reducing the payment of a cost of living allowance to employees who already enjoyed reduced living costs through access to military commissaries and post exchanges. The Constitution does not preclude the consideration of receipt of one program's benefits in the calculation of benefits levels for a second program. *See Knebel* v. *Hein,* 429 U.S. 288 (1977).

Based on the foregoing, we affirm the judgment below.

AFFIRMED

A True Copy.

Attest:

/S/ W. Richard Sienkiewick

Deputy Clerk

United States Court of Appeals for the Federal Circuit

CHARLES R. KESTER, ROLAND D.
LIBBY HAZEL D. SUTHERLAND, and
WILLIAM B. SUTHERLAND, ET AL.,

Appellants, Appeal No. 85-884.

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Appellee.

MILLER, *Senior Circuit Judge,* dissenting in part.

The record shows that, in setting the COLA for appellants, "living costs" substantially higher than those in the District of Columbia were reduced to reflect commissary and exchange privileges of employees in Hawaii—without taking into account such privileges of otherwise similarly situated employees in the District of Columbia. Thus, any differential between "living costs" in Hawaii and those in the District of Columbia *would have been understated.* OPM's interpretation of "living costs" in the District of Columbia under 5 U.S.C. § 5941 is arbitrary, and no rational basis for the flawed differential appears.

In all other respects, I am in agreement with the majority opinion.

United States Court of Appeals for the Federal Circuit

No. 85-884
76-0423

CHARLES R. KESTER, RONALD D. LIBBY,
HAZEL D. SUTHERLAND AND WILLIAM B. SUTHERLAND, ET AL.,
Plaintiffs-Appellants

vs.

DONALD J. DEVINE, DIRECTOR, ETC.
Defendant-Appellee

Judgment

ON APPEAL from the U.S. DISTRICT COURT OF HAWAII (HONOLULU)

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

Dated November 21, 1985 *ENTERED BY ORDER OF THE COURT*
Francis X. Gindhart, Clerk

/S/ Francis X. Gindhart

United States Court of Appeals for the Federal Circuit

CHARLES R. KESTER, RONALD D. LIBBY, HAZEL D. SUTHERLAND & WILLIAM B. SUTHERLAND, ET AL., Appellants,

v.

No. 85-884

DONALD J. DEVINE, DIRECTOR, ETC. Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

FOR THE COURT

/S/ Francis X. Gindhart

Francis X. Gindhart, Clerk

February 24, 1986

cc. David M. Robinson
Stephen J. McHale

United States Court of Appeals for the Federal Circuit

CHARLES R. KESTER, ET AL.,

Appellants,

v.

Appeal No. 85-884

CONSTANCE HORNER, Director
OFFICE OF PERSONNEL MANAGEMENT,

Appellee.

Before BALDWIN, KASHIWA, *Circuit Judges,* and MILLER, *Senior Circuit Judge.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for reharing be, and the same hereby, is denied.

FOR THE COURT

/S/ Francis X. Gindhart

Francis X. Gindhart, Clerk

4/8/86

Date

cc: Mr. David M. Robinson
Mr. Stephen J. McHale

United States Court of Appeals for the Federal Circuit

CHARLES R. KESTER, ROLAND D. LIBBY, ET AL.,
Appellants,

vs. Appeal No. 85-884

DONALD DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Appellee.

Judgment

ON APPEAL from the U.S. DISTRICT COURT OF HAWAII, HONOLULU DIVISION

IN CASE NO(S). 76-0423.

This CAUSE having been heard and considered,, it is

ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

/S/ Francis X. Gindhart
FRANCIS X. GINDHART, CLERK

DATED April 18, 1986

COSTS AGAINST THE APPELLANT:
Printing $74.72
TOTAL $74.72